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A SURVEY OF RECENT TAKINGS CASES IN THE COURT OF FEDERAL CLAIMS AND THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

George W. Miller
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We undertake in this Article to survey takings cases decided by the United States Court of Federal Claims and by the United States Court of Appeals for the Federal Circuit in the period following the publication of a similar survey in this journal in 1991.¹ Thus, while we deal with some cases decided in 1991, the bulk of the cases we survey were decided in 1992 and through mid-1993.

I. REGULATORY TAKINGS

A. Reasonable Expectations In A Regulated World

In many of their recent takings decisions, the United States Court of Federal Claims (formerly the Claims Court)² and the United States Court of Appeals for the Federal Circuit analyzed the legitimate expectations of property owners by focusing on the regulatory scheme that governed the property at the time it was acquired. Although the courts referred often to the

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1. Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549 (1991).

2. The Claims Court was renamed the United States Court of Federal Claims effective October 29, 1992. See Court of Federal Claims Technical and Procedural Improvements Act of 1992, § 902, Pub. L. No. 102-572, Title IX, 106 Stat. 4516 (1992).

Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*,³ their ultimate decisions follow a long line of cases applying a simple principle—those who buy property subject to a preexisting regulatory scheme will have great difficulty showing that a later regulatory action went so far beyond that which a reasonable owner would have anticipated as to effect a taking of their property.

1. *Lucas And an Owner's "Title to Begin With"*

In *Lucas*, the Supreme Court dealt a blow to regulators of property use by completely rejecting the hoary "nuisance exception"—the notion that some uses of property are so harmful or "noxious" that they can be prohibited even to the point of destroying the value of property without the need to pay compensation.⁴ That exception, the Court explained, was nothing but a turn in the historical road toward the Court's modern recognition of the states' broad police power.⁵

Instead, in a holding that has rooted several of the Court of Federal Claims' decisions since, the Supreme Court explained that the power of government to regulate a particular owner's property without paying compensation depends on the state of the law at the time he acquired the property. In *Lucas*, the Court stated that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."⁶ Thus, after *Lucas*, states may prohibit all economically beneficial use of land only if the prohibition "does not proscribe a productive use that was previously permissible under relevant property and nuisance principles."⁷

By imposing compensation obligations on legislative action in this way, the Court surely must have imagined that its holding would protect property owners against regulatory excesses imposed after they acquired their property. With a nod to *Lucas*'s focus on the state of the law at the time land was acquired, however, the Court of Federal Claims has headed in exactly the opposite direction. In doing so, the court has identified a major question

3. 112 S. Ct. 2886 (1992).

4. *Id.*

5. *Id.* at 2897.

6. *Id.* at 2899. The Court noted that this view "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Id.*

7. *Id.* at 2901. "When . . . a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Id.*

left open after *Lucas*: Must preexisting law have precluded precisely the use at issue before regulators will be permitted to prohibit it without incurring compensation obligations?

2. Preseault—*Title and Trails*

The Court of Federal Claims' decision in *Preseault v. United States*⁸ suggests that the preexisting regulatory scheme need not have addressed the later-prohibited use very specifically at all. In *Preseault*, the court confronted the impact of the "Rails to Trails" statute on the owners of property subject to railway easements.⁹ Under the statute, actually called the National Trails System Act Amendments of 1983 (the National Trails Act),¹⁰ the Interstate Commerce Commission (ICC) was authorized to preserve for possible future railroad use any right-of-way that would otherwise be abandoned and to allow interim use of the land as a recreational trail.¹¹ In *Preseault*, the plaintiffs, who claimed reversionary interests in a former railroad's right-of-way, alleged that the right-of-way consisted of railroad easements; that these easements had been abandoned; that upon abandonment, the land reverted to them; and that the ICC therefore effected a taking of their property when it approved an agreement between the State of Vermont and the City of Burlington for use of their land as a bicycle trail.¹²

The Court of Federal Claims, in an opinion by Judge Nettlesheim, rejected that claim. Using *Lucas* as a guide, the court held that the plaintiffs had no reasonable expectation of being able to use the land subject to the railway easement immediately after rail service ceased.¹³ According to the court, *Lucas* "fixes the date on which the claimant acquires his interest for determining whether he possesses a compensable property interest."¹⁴ On that basis, the court traced the history of state railroad regulation dating back to the nineteenth century and the history of federal railroad regulation to not much more modern times.¹⁵ The court was careful to warn that the mere assertion of "general regulatory authority" over property was insufficient to undermine its owner's expectation of using it free of regulatory prohibitions:¹⁶ "The conversion to trails, with the attendant postponement of the ripening of reversionary interests, had to be in the picture in order to cir-

8. 27 Fed. Cl. 69 (1992), *appeal docketed*, No. 93-5067 (Fed. Cir. Jan. 28, 1993).

9. *Id.* at 92-94.

10. Pub. L. No. 98-11, 97 Stat. 48 (codified at 16 U.S.C. § 1247(d) (1988)).

11. *Id.*

12. *Preseault*, 27 Fed. Cl. at 71.

13. *Id.* at 94.

14. *Id.* at 87.

15. *Id.* at 73-81.

16. *Id.* at 90.

cumscribe a compensable property interest at the date of [plaintiffs'] acquisition [of the land]."¹⁷

Having said that, however, the court then found that the regulatory scheme in place at the time the Preseaults bought their land was sufficient to undermine any expectation they might have had of being free to use the land after it ceased to be used for railroad purposes.¹⁸ According to the court, the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act),¹⁹ which predated the plaintiffs' purchase, was enough to deny them any compensable property interest.²⁰ Yet, as described by the court, the 4-R Act's substantive provisions did little more than seek to maintain as much rail service as possible, in the face of an escalating pace of railway abandonments.²¹

The only two provisions of the 4-R Act described by the court that might be thought related to the conversion to trails were § 809(b)(3), which directed the Secretary of the Interior "to provide financial assistance to all governmental entities 'for programs involving the conversion of abandoned railroad rights-of-way to recreation and conservational uses,' "²² with trails being one of the specifically enumerated uses; and § 809(c), which "author-

17. *Id.*

18. *Id.* at 94.

19. Pub. L. No. 94-210, 90 Stat. 31 (codified in scattered sections of 49 U.S.C.).

20. *Preseault*, 27 Fed. Cl. at 93. The court noted that the plaintiff's predecessors in interest were forced to convey their land holdings for the construction of the railroad, and that the 4-R Act "ha[s] not expanded or changed the right-of-way. The easement is subject to a different, governmentally-sanctioned use that is compatible with preservation and resumption of rail traffic." *Id.* Reviewing the operation of the 4-R Act on the plaintiffs' property rights, the court held:

All the property interests involved in this case were acquired after passage of this legal framework. Although the ICC could not defer issuing a certificate of abandonment indefinitely, the ripening of plaintiffs' interests depended on an incongruous series of events: (1) an ICC finding that the rail property was not suitable for public use; or (2) no one willing to buy, lease, or exchange for the rail property; and (3) no other way to dispose of the property. Moreover, plaintiffs acquired their interests between 1979 and 1990 against a backdrop of state law that for years would not have recognized ripening of a reversionary interest in a railroad easement without issuance of a certificate of abandonment. Although plaintiffs' reversionary interests could have ripened had no trail operator presented itself, the ICC would not have issued an unconditional certificate of abandonment had one been on the scene. Plaintiffs' argument that this interest would have reverted automatically by operation of law before the 1983 amendments and section 1247(d) is frustrated by the 4-R Act's detailed provisions for prereversionary disposal of public purpose railroad properties and the deferential law of Vermont.

Id. at 94. The court concluded that "[t]he nature of the encumbrance remained the same; the use to which the easements were put, evolving from railroading to railbanking, is consistent with preserving the easements for rail use." *Id.*

21. *Id.* at 78-79.

22. *Id.* at 78 (quoting 4-R Act § 809(b), 90 Stat. at 145).

ized the ICC to delay the disposition of rail property for up to 180 days after the effective date of an order permitting abandonment, unless the property had first been offered for sale on reasonable terms for public uses, including recreational use."²³ If anything, these provisions suggest that after enactment of the 4-R Act, one considering the purchase of land subject to a rail easement would have expected the ICC to try to work out a sale of the land for recreational uses, not that it would unilaterally declare the property usable for that purpose, as the later National Trails Act authorized.

Although the court in *Preseault* relied squarely on *Lucas*, earlier cases recognized that one who buys land subject to a preexisting regulatory scheme can have no legitimate expectation of using it in any way inconsistent with that scheme.²⁴ For example, in *Ciampitti v. United States*,²⁵ the Claims Court did not need *Lucas* to follow this line of decisions and hold that a person who buys land knowing it to contain wetlands suffers no compensable taking when the government prohibits filling of the wetlands.²⁶ Similarly, in *American Satellite Co. v. United States*,²⁷ the court did not need *Lucas* to hold that a person who contracts to send his satellite on the space

23. *Id.* (citing 4-R Act § 809(b)(3), 90 Stat. at 145 (codified at 49 U.S.C. § 10906 (1988))); see note following 49 U.S.C. § 10906 (1982). The 4-R Act contained a general statement of purpose and certain reporting provisions, indicating a congressional concern about the pace at which railroad rights-of-way were being abandoned. *Preseault*, 27 Fed. Cl. at 78. Other than the provision for financial assistance to enable "recreation and conservational uses," the only substantive provisions described by the court required the Secretary of Transportation to provide financial assistance to states to cover costs associated with continued rail service, and to establish a "federal rail bank" for the purpose of preserving existing rail service in certain areas. *Id.* at 78-79.

24. See, e.g., *Connolly v. Pension Benefits Guar. Corp.*, 475 U.S. 211 (1986) (holding that employers on notice that pension plans were regulated and that withdrawal from plan might trigger additional financial obligations); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (Monsanto on notice of the EPA's authority to use data submitted to it, and therefore had no reasonable, investment-backed expectation that the data would be kept confidential); see also *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2291-92 (1993) (holding that employers on notice of pension regulations).

25. 22 Cl. Ct. 310 (1991).

26. *Id.* at 320 (citing *Ruckelshaus*, 467 U.S. at 1006; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978)). The court noted that the landowner had more than ample warning prior to purchase that the property was encumbered by a likelihood that it could not be developed

. . . .

To find that the Federal Government has taken a property interest in the form of a distinct, reasonable, investment-backed expectation, would, in this instance, turn the Government into an involuntary guarantor of [the landowner]'s gamble. This, the court declines to do.

Id. at 321.

27. 26 Cl. Ct. 146 (1992), *rev'd on other grounds*, No. 92-5136, 1993 WL 242669 (Fed. Cir. July 7, 1993).

shuttle suffered no taking of his contract rights when, in the wake of the Challenger disaster, the President limited shuttle space to shuttle-specific or national security-related cargoes.²⁸ Given the government's known propensity to use the shuttle as a tool of national space policy and to implement the country's economic, security, and foreign policy interests, it would have been "an exercise in blind optimism for the plaintiff to assume that space policy would remain static."²⁹

Lucas did have a role in the rationale of the *Preseault* decision, however. The *Lucas* decision motivated the Court of Federal Claims' stated refusal to deny the Preseaults' property right based only on a mere assertion of "general regulatory authority" over the land before they bought it.³⁰ Even though the preexisting regulatory scheme did not accomplish much more than that, the court at least expressed its insistence on a more specific regulatory focus prior to acquisition—a focus on "[t]he conversion to trails"—before it would find that the state of the law limited the Preseaults' legitimate expectations when they bought their land.³¹ This distinction was based on the court's analysis of the disagreement in *Lucas* between Justice Stevens, who would have been satisfied with the "'generality of a regulation of property,'"³² and the majority, which insisted on a "brightline test which would have the only relevant expectancies be those firmly rooted in law on the date of the acquisition of property."³³ The specificity with which prior law must have addressed a particular use will undoubtedly be the focus of additional post-*Lucas* litigation.

3. Bank Seizures—The Classic Known Risk

The Federal Circuit and the Court of Federal Claims adopted a similarly general focus on preexisting regulatory schemes when, in several cases, they considered and rejected claims that bank regulators effected takings by seizing failing or failed financial institutions and disposing of their assets. The courts' adoption of the more general focus led to an intuitive result—the risk of business failure is known to anyone who enters the business world, and although the procedure may change, if the business is banking, the consequence of failing is seizure.

28. *Id.* at 160.

29. *Id.*

30. *Preseault v. United States*, 27 Fed. Cl. 69, 90 (1992).

31. *Id.*

32. *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2923 (1992) (Stevens, J., dissenting)).

33. *Id.*

In *California Housing Securities, Inc. v. United States*,³⁴ the plaintiff, California Housing Securities, bought the Saratoga Savings and Loan Association a year after it became a California-chartered savings and loan institution.³⁵ California required its savings and loan institutions to participate in a deposit insurance program.³⁶ Accordingly, Saratoga applied for and received federal deposit insurance from the Federal Savings and Loan Insurance Corporation (FSLIC).³⁷ Under the statutory and regulatory scheme as it existed at that time, Saratoga pledged it would comply with FSLIC regulations, and it understood it could be put in receivership in certain circumstances defined by statute, including a "substantial dissipation of assets or earnings" arising from any violation of applicable regulations and "any unsafe or unsound practice."³⁸ As receiver, FSLIC would then have the authority to liquidate the institution or make "such other disposition of the matter as it deem[ed] to be in the best interests of the institution, its savers, and the [FSLIC]."³⁹

The year 1989 brought structural changes to savings and loan regulation, with enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),⁴⁰ and creation of the Office of Thrift Supervision and the Resolution Trust Corporation (RTC).⁴¹ Shortly thereafter, the RTC was appointed receiver of Saratoga and liquidated the institution.⁴²

As owner of Saratoga, California Housing Securities filed suit, claiming that the RTC had taken its property by physical seizure.⁴³ The Claims Court denied relief, and the Federal Circuit agreed.⁴⁴ Saratoga voluntarily entered the savings and loan industry in California, and California Housing Securities voluntarily bought it thereafter. As a participant in this "longest regulated and most closely supervised of public callings,"⁴⁵ Saratoga understood,

34. 959 F.2d 955 (Fed. Cir.), *cert. denied*, 113 S. Ct. 324 (1992).

35. *Id.* at 955.

36. *Id.* (citing CAL. FIN. CODE § 5006(2) (West 1991)).

37. *Id.*

38. 12 U.S.C. § 1464(d)(6)(A)(ii) (1988) (amended by Pub. L. No. 101-73, 103 Stat. 282 (1989)).

39. 12 U.S.C. § 1729(c)(3)(B) (1988) (repealed 1989).

40. Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered section of 12 U.S.C.).

41. *Id.* §§ 301, 501, 103 Stat. at 278, 369 (codified at 12 U.S.C. §§ 1441-1468 (Supp. II 1990) and scattered sections of 5 U.S.C. and 12 U.S.C.).

42. *California Housing Sec., Inc. v. United States*, 959 F.2d 955, 956 (Fed. Cir.), *cert. denied*, 113 S. Ct. 324 (1992).

43. *Id.* at 956-57.

44. *Id.* at 957, 961.

45. *Id.* at 958 (quoting *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)).

with what may only be viewed as a historically rooted expectation, that the federal government would take possession of its premises and holdings as conservator or receiver if it substantially dissipated its "assets or earnings due to any violation or violations of law or regulations, or to any unsafe or unsound practice or practices[.]"⁴⁶

Thus, no taking occurred when this known possibility came to pass.⁴⁷

The Claims Court anticipated this reasoning and result in *American Continental Corp. v. United States*,⁴⁸ decided a year before *California Housing Securities*, and the court used the same approach in *Golden Pacific Bancorp v. United States*,⁴⁹ decided a month after. All three cases are premised on the assumption that anyone buying an asset subject to as long-standing and extensive a regulatory scheme as the banking and savings and loan industries has no expectation of being treated any differently than any other participant in those industries.⁵⁰

46. *Id.* (quoting 12 U.S.C. § 1464(d)(6)(A)(ii) (1988) (amended 1989) (alteration in original)).

47. *Id.* at 959-60 (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984)).

48. 22 Cl. Ct. 692 (1991).

49. 25 Cl. Ct. 768 (1992), *appeal docketed*, No. 92-5141 (Fed. Cir. July 9, 1992).

50. The Court of Federal Claims and Court of Appeals for the Federal Circuit have decided one banking case out of this mold. In *Winstar Corp. v. United States*, 994 F.2d 797 (Fed. Cir. 1993), the plaintiff did not enter the industry in the ordinary way. Instead, Winstar bought a failing S&L, Windom Federal, pursuant to a negotiated agreement with the relevant regulatory agencies, the Federal Home Loan Bank Board (FHLBB) and the FSLIC. *Id.* at 803. Under a "forbearance letter" from the FHLBB (made part of Winstar's "Assistance Agreement" with the FSLIC), Winstar was permitted to treat any excess in the cost of acquisition over the fair market value of Windom's assets—that is, Windom's capital deficit—as an asset, to call it goodwill, and to amortize it over a period of 35 years. *Winstar Corp. v. United States*, 21 Cl. Ct. 112, 113-15 (1990). On its enactment five years later, FIRREA changed the rules. Under FIRREA, "supervisory goodwill" could not exceed a specified percentage of an S&L's assets and could be amortized over a period of no more than 20 years. *Winstar*, 994 F.2d at 805. Winstar sued, claiming that by enacting FIRREA, the government had breached its contract or, alternatively, had effected a taking of Winstar's contractual rights. *Id.* at 806-07. The Claims Court agreed with Winstar, holding that Winstar had an enforceable contractual right to use the goodwill device in order to meet minimum capital requirements. *Winstar Corp. v. United States*, 25 Cl. Ct. 541 (1992).

The Federal Circuit reversed, holding that when Winstar agreed to assist the FSLIC by buying the failing thrift, it could have negotiated a more explicit agreement with the government: "[O]ne who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms." *Winstar*, 994 F.2d at 809 (quoting *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 618 (D.C. Cir. 1992) (quoting *Western Fuels—Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C. Cir.), *cert. denied*, 498 U.S. 811 (1990))); *see also* *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986) (holding that Congress may abrogate a state's previous right to withdraw from the Social Security system). Even that might not have been enough. The Federal Circuit suggested in dicta that the government's power to act as sovereign "cannot be contracted away," *Winstar*, 994 F.2d at 810 (quoting *North Am. Commercial Co. v. United States*, 171 U.S. 110, 137 (1898)), and that

Therefore, as in *Preseault* and *Ciampitti*, the lesson of *California Housing Securities* is that *Lucas* has worked no revolution, at least as far as the Court of Federal Claims is concerned. In order to recover against the government for later expansion of a preexisting regulatory scheme, owners have long had to show that the new regulation was so qualitatively different from the prior scheme as not to have been reasonably foreseeable.⁵¹

4. Governmental Delay—Another Known Risk

Owners of regulated property universally expect delay at the hands of regulators, and the Court of Federal Claims has continued to deny temporary taking relief when regulators dawdle. In *1902 Atlantic Ltd. v. United States*,⁵² for example, the owner of a small wetlands parcel applied in April 1981 for a permit to fill the parcel so that it could be used for commercial and industrial development.⁵³ The Army Corps of Engineers issued several preliminary decisions denying the permit, and each time, the owner applied again.⁵⁴ Thereafter, the owner sued in federal district court and, after trial, won an order directing the Corps to issue the permit.⁵⁵ The Corps finally did so in April 1985, four years after the initial application and long after several required state and local permits had expired. The Claims Court

“a State need not ‘adhere to a contract that surrenders an essential attribute of its sovereignty.’” *Id.* (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977)). The court added that because the right to contract does not empower a private party to restrict acts of Congress, “the government’s agents of the executive branch, acting by way of contracting authority, cannot do so either.” *Id.* This ruling against one who actually contracted with the government bodes ill for those without a contract who claim a later change in the regulatory scheme effects a taking. By order dated August 18, 1993, the Court of Appeals for the Federal Circuit granted rehearing en banc in *Winstar*.

51. One aspect of FIRREA’s regulatory expansion might possibly be held to work so radical a change from the preexisting scheme as to support a taking claim. Under traditional common law rules, one affiliated bank could be held responsible for the liabilities of another on the same basis as any other corporate affiliate could be—on a showing of failure to honor corporate formalities or other circumstances that would justify treating the assets of one corporation as the assets of its affiliate. In order to provide an additional source of clean-up funds, however, FIRREA contained a “cross-guarantee” provision, which essentially allowed the FDIC to impose a failed bank’s liabilities on any of its affiliates, no matter how independently they were operated by their common parent. 12 U.S.C. § 1815(e) (1988 & Supp. III 1991). While a buyer of a group of affiliated banks would take subject to this regulatory abrogation of the traditional incidents of corporate ownership, one who owned affiliated banks before FIRREA was enacted might well suffer a taking by the FDIC’s reliance on this provision to appropriate assets of a failed bank’s healthy affiliate. See generally Christopher T. Curtis, *The Takings Clause and Regulatory Takeovers of Banks and Thrifts*, 27 HARV. J. ON LEGIS. 367 (1990) (arguing against taking liability pre-*Lucas*). This issue has not been decided by the Court of Federal Claims or the Court of Appeals for the Federal Circuit.

52. 26 Cl. Ct. 575 (1992).

53. *Id.* at 576.

54. *Id.* at 576-77.

55. *Id.* at 577.

found that the Corps' four-year delay interfered with no "legally protected right,"⁵⁶ despite the fact that the Corps' denial of the permit was "arbitrary and capricious."⁵⁷ The court reasoned that governmental delay is an "inevitable cost of doing business in a highly regulated society."⁵⁸

B. The Parcel As A Whole: All Economically Viable Use Of What?

The Court of Federal Claims has focused on (but not resolved) another central question left open by the Supreme Court in *Lucas*. The *Lucas* Court recognized two instances when regulatory action is "compensable without case-specific inquiry into the public interest advanced in support of the restraint."⁵⁹ The first is when an owner is compelled by regulation to suffer a physical invasion of his property.⁶⁰ The second occurs when the regulation or other action "denies all economically beneficial or productive use of land."⁶¹ That phrase has a long history in takings cases,⁶² but it creates the obvious problem of defining the property at issue. The *Lucas* Court frankly acknowledged that the problem has never been resolved.⁶³

The Claims Court took a very broad view of the "parcel as a whole" in *Ciampitti v. United States*,⁶⁴ a case decided before *Lucas* and whose reasoning may not survive it. After having developed a parcel of lots and selling many of them, Ciampitti bought two tracts adjoining the subdivision.⁶⁵ One

56. *Id.* at 581.

57. *Id.* at 582.

58. *Id.* at 582 n.6 (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 204 (1985)). For another Claims Court decision rejecting temporary taking claims based on the Corps' permitting delay, see *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334, 1352-54 (1992), *appeal docketed*, No. 93-5029 (Fed. Cir. Nov. 23, 1992).

59. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).

60. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *see also Lucas*, 112 S. Ct. at 2893.

61. *Lucas*, 112 S. Ct. at 2893.

62. *See, e.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

63. *Lucas*, 112 S. Ct. at 2894 n.7. The Court observed:

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id.

64. 22 Cl. Ct. 310, 318 (1991).

65. *Id.* at 312.

was buildable; the other he knew to be wetlands.⁶⁶ After the Corps of Engineers refused him a permit to fill the wetlands portion, Ciampitti sued, alleging a taking of the wetlands portion.⁶⁷ The court rejected his claim, and one of its two independent reasons for doing so provides an instructive analysis of the “parcel as a whole” problem.⁶⁸

The Claims Court, in an opinion by Judge Bruggink, held that Ciampitti had suffered only a partial diminution in the value of his tract, because both the wetlands and the buildable portions of his property had to be considered together.⁶⁹ The court held this to be the case even though the two portions were not contiguous.⁷⁰ The court listed several relevant factors to be considered in deciding whether to treat two sections of property as a whole including “the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, [and] the extent to which the protected lands enhance the value of remaining lands.”⁷¹ The “most persuasive consideration” was that Ciampitti bought the two parcels simultaneously and treated them as a single parcel for purposes of the purchase and financing.⁷² In addition, at least at the time he “began negotiating” the purchase, Ciampitti still owned some of the lots in the subdivision in between, though many had already been sold off to consumers.⁷³ Since the buildable portion retained substantial value even after the Corps denied the permit to fill the wetlands portion, the Corps’ action only resulted in a decline in the value of the parcel as a whole, which alone does not effect a taking.⁷⁴

66. *Id.*

67. *Id.* at 311.

68. *Id.* at 318-20. The other ground relied on in *Ciampitti* is discussed above—Ciampitti bought the land knowing it was state-designated wetlands and therefore had no reasonable investment-backed expectation of developing it. *See id.* at 321-22; *see also supra* section I.A.2.

69. *Ciampitti*, 22 Cl. Ct. at 318. The court pointed to the Supreme Court’s holdings in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978), as the foundation for the “parcel as a whole” inquiry. *Ciampitti*, 22 Cl. Ct. at 318. The court noted:

Admittedly, in those cases the Court was not directly dealing with a governmental contention that additional land ought to be included in the calculus. Instead, the question was whether certain rights within a “bundle” of rights could be segregated and viewed separately. That same analysis may not always be appropriate in weighing the Government’s contention that the analysis should be broadened to include other property held by the plaintiff, but in the court’s view, it fits here.

Id.

70. *Ciampitti*, 22 Cl. Ct. at 320.

71. *Id.* at 318.

72. *Id.* at 320.

73. *Id.*

74. *Id.* The court stated that it would be incorrect for the plaintiff to separate the parcels for purposes of asserting a taking, and observed:

Following the *Ciampitti* decision, the *Lucas* Court called into serious question whether noncontiguous parcels can ever be considered together for purposes of analyzing a regulation's impact.⁷⁵ But because the issue was not presented directly in *Lucas*—*Lucas*'s two lots were rendered entirely valueless by the prohibition against building—*Lucas* provides no real guidance about how to define the parcel as a whole.⁷⁶ Clearly, though, by creating an automatic compensation rule whenever a regulation deprives an owner of "all economically viable use" of his property, *Lucas* has raised the importance of the issue. If a regulation destroys the value of part of a tract while the rest of the tract retains value, defining the "parcel" will often determine whether a taking has occurred. *Ciampitti*'s list of factors provides as useful a basis as any for making this now critical finding.⁷⁷

Ciampitti is, in effect, asking to isolate the least valuable portion of the purchase when he himself saw the parcels as inextricably linked in September 1983. The court concludes that "the parcel as a whole" must, in this case, include those uplands purchased on September 15, 1983 which *Ciampitti* still owned as of June 5, 1986. A residual value of \$14 million precludes a finding that there was a taking.

Id.

75. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992). The Court cited *Penn Central Transportation Co. v. City of New York*, 366 N.E.2d 1271, 1276-77 (1977), *aff'd*, 438 U.S. 104 (1978), as "an extreme—and, we think, unsupportable—view of the relevant calculus, where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of the total value of the taking claimant's other holdings in the vicinity." *Lucas*, 112 S. Ct. at 2894 n.7 (citation omitted).

76. *Lucas*'s only contribution on this issue, aside from disparaging the treatment of non-continuous parcels as a single whole, is to make clear that in assessing the scope of the property taken, the

answer . . . may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

Lucas, 112 S. Ct. at 2894 n.7. In offering this view, the *Lucas* Court contrasted two prior Supreme Court decisions it found "inconsistent" with one another, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922), which the Court described as involving a "law restricting subsurface extraction of coal held to effect a taking," *Lucas*, 112 S. Ct. at 2894 n.7, and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502 (1987), which the Court described as involving a "nearly identical law held not to effect a taking." *Lucas*, 112 S. Ct. at 2894 n.7. The Court of Federal Claims has been clear in holding that property interests like mineral rights that have long been recognized under state property law are separately cognizable in regulatory taking cases. *See, e.g.*, *Rybachek v. United States*, 23 Cl. Ct. 222, 225 (1991) (citing *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 405 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991)).

77. *See also* *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334, 1346 (1992) (post-*Lucas* decision following *Ciampitti*'s list of factors), *appeal docketed*, No. 93-5029 (Fed. Cir. Nov. 23, 1992).

II. TAKINGS BY PHYSICAL OCCUPATION

A. *Lucas and Physical Occupation*

For years, the distinction between physical occupation of property and excessive regulation of its use has been central to takings analysis. Physical occupation has been said to amount to a taking almost automatically, while regulatory excess amounts to a taking only after an “essentially ad hoc, factual” analysis.⁷⁸ *Lucas* narrowed the area of uncertainty in the regulatory context by making clear that a taking occurs “categorically” when a regulation has the effect of denying an owner “all economically beneficial or productive use of land.”⁷⁹ But by focusing regulatory taking analysis on the expectations of the owner—i.e., on whether the prohibited use was “part of his title to begin with”—the *Lucas* Court may have weakened the protection against uncompensated physical occupations even as it marginally strengthened the protection against regulatory excess.

The United States is now defending even physical occupation claims by arguing that a preexisting regulatory scheme can justify government action that has the effect of allowing others entry onto private land. This argument is exactly the opposite of the *Lucas* Court’s categorical treatment of physical occupations⁸⁰ (and of the Court’s holdings in earlier physical occupation cases).⁸¹ Thus, for example, in *Preseault v. United States*,⁸² the Preseaults claimed that the National Trails Act not only effected a regulatory taking, but that it also imposed a physical occupation of their land by allowing hikers to enter after the land had reverted to them.⁸³ The Government has argued on appeal that even if this amounts to a physical occupation, it would nevertheless *not* constitute a taking because the long-standing regulation of railroad rights-of-way precluded any historically rooted expectation of undisturbed possession.⁸⁴ The Government offered *California Housing Securities, Inc. v. United States*⁸⁵ as one of the major bases for this use of

78. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-35 (1982) (finding a taking where physical occupation was installation of television cable in apartment buildings).

79. *Lucas*, 112 S. Ct. at 2893.

80. *Id.* at 2893.

81. *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) (holding that a government-imposed requirement that the public be allowed on property amounts to a taking by physical occupation); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (holding that a government-imposed easement of passage onto private land effected a taking by physical occupation).

82. 27 Fed. Cl. 69 (1992).

83. *Id.* at 81.

84. Brief for the United States at 43-45, *Preseault v. United States*, Nos. 93-5067, 93-5068 (Fed. Cir. filed Jan. 28, 1993).

85. 959 F.2d 955 (Fed. Cir.), cert. denied, 113 S. Ct. 324 (1992).

expectations in a physical occupation case—if the outright seizure of a bank effects no taking because of a preexisting regulatory scheme, then surely the same can be true of a requirement that hikers be allowed to enter land.⁸⁶ There may be truth to that, but if so, then the new focus on expectations and the “title to begin with” may have the unintended effect of introducing softness and uncertainty into the previously “categorical” requirement of compensation in cases of physical occupation of real property.

B. Government Action

1. *The Hendler Case—Owner’s Non-Consent*

In *Hendler v. United States*,⁸⁷ the United States Court of Appeals for the Federal Circuit addressed whether the Environmental Protection Agency’s (EPA) and the State of California’s entry onto land located adjacent to a hazardous waste site to install groundwater monitoring wells and to conduct groundwater monitoring activities constituted either a regulatory taking or a taking by physical occupation.⁸⁸ The case involved a decade-long dispute between the EPA, California (which assisted EPA in its Superfund efforts), and property owners. In September 1983, the EPA issued an administrative order granting itself and California access to the property in order to construct, operate, and maintain groundwater wells.⁸⁹ Shortly thereafter, the EPA and California commenced groundwater monitoring activities on the property, located adjacent to the Stringfellow Acid Pits in Riverside County, California.⁹⁰ In 1984, the property owners filed a complaint in the Claims Court alleging that the EPA’s and California’s activities constituted a compensable taking.⁹¹

Two different Claims Court judges heard the matter. Judge Mayer granted the Government’s summary judgment motion on the ground that no regulatory taking occurred and that the government was not responsible for California’s activities on the property.⁹² Judge Mayer further denied the property owners’ summary judgment motion, which proceeded on the theory that the government’s physical occupation of the property constituted a compensable taking.⁹³ Later, Judge Robinson dismissed the property owners’ lawsuit with prejudice as a sanction for the property owners’ failure to

86. *Preseault*, 27 Fed. Cl. at 87 (citing *California Housing*, 959 F.2d at 958).

87. 952 F.2d 1364 (Fed. Cir. 1991).

88. *Id.* at 1367.

89. *Id.* at 1369.

90. *Id.* at 1369-70.

91. *Id.*

92. *Hendler v. United States*, 11 Cl. Ct. 91 (1986), *dismissed*, 19 Cl. Ct. 27 (1989), *rev’d*, 952 F.2d 1364 (Fed. Cir. 1991).

93. *Id.* at 96-97.

comply adequately with the Government's discovery requests.⁹⁴ The property owners appealed to the Federal Circuit.

In an opinion authored by Circuit Judge Plager, the Federal Circuit reversed.⁹⁵ The court of appeals first addressed the question of whether the Claims Court erred by denying the owners' motion for summary judgment on a regulatory taking theory. The court agreed with the Claims Court holding that the issuance of EPA's order, which prohibited the property owners from interfering with EPA's access to the property to install groundwater monitoring wells, did not constitute, in and of itself, a regulatory taking.⁹⁶ However, the Federal Circuit stated that "subsequent events, in light of the character of the Government's action and plaintiffs' distinct investment-backed expectations, might have had sufficient economic impact on the plaintiffs to constitute a regulatory taking."⁹⁷ In view of the fact-specific inquiry involved, the Federal Circuit stated that "we understand the trial judge to have refrained from deciding this issue on summary judgment. It remains an issue in the case."⁹⁸

Having held that the Claims Court did not err in denying the property owners' summary judgment motion on the theory that issuance of the EPA order in and of itself had effected a regulatory taking, the Federal Circuit next concluded that the actions of the EPA and California, in placing groundwater wells on the plaintiffs' property, effected a taking under traditional physical occupation theory.⁹⁹ Accordingly, the court of appeals held, the Claims Court erred in denying the property owners' motion for summary judgment on liability based upon that theory.¹⁰⁰ The court of appeals recognized that the physical occupation cases require that the occupation be "permanent" in order to constitute a compensable taking.¹⁰¹ The court held, however, that the term "'permanent' does not mean forever, or anything like it."¹⁰² Rather, the court stated, a taking by physical occupation can be for a limited term, i.e., the interest taken may be an estate for years, which has a term of finite duration as distinct from the infinite term of an estate in fee simple absolute.¹⁰³ The court also noted that, while called an

94. *Hendler v. United States*, 19 Cl. Ct. 27 (1989), *rev'd*, 952 F.2d 1364 (Fed. Cir. 1991).

95. *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

96. *Id.* at 1375.

97. *Id.*

98. *Id.*

99. *Id.* at 1378-79.

100. *Id.* at 1375.

101. *Id.* at 1375-76 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

102. *Id.* at 1376.

103. *Id.*

estate for years, the duration of such an estate can be less than one year.¹⁰⁴ The court relied upon three cases involving physical occupations that occurred during World War II.¹⁰⁵

The court stated that there was nothing "temporary" about the wells the government installed on the plaintiffs' property.¹⁰⁶ After describing their physical features, the court concluded that they were "at least as 'permanent' . . . as the [cable television] equipment in *Loretto*, which comprised only a few cables attached by screws and nails and a box attached by bolts."¹⁰⁷ The court then observed that "[i]f the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*."¹⁰⁸

The court also held that "the concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted."¹⁰⁹ In that regard, the court relied on the Supreme Court's decisions in *Kaiser Aetna v. United States*¹¹⁰ and *Nollan v. California Coastal Commission*.¹¹¹ In particular, the court cited language from *Nollan* that "[w]e think a "permanent physical occupation" has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed,

104. *Id.* (citing JOHN E. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 54 (3d ed. 1989)).

105. *Id.* (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945)).

106. *Id.*

107. *Id.* (citation omitted).

108. *Id.* at 1377. The court described the distinction between a mere trespass and a physical occupation sufficient to constitute a taking in the following terms:

The distinction between the government vehicle parked one day on O's land while the driver eats lunch, on the one hand, and the entry on O's land by the government for the purpose of establishing a long term storage lot for vehicles and equipment, on the other, is clear enough.

Id. at 1371.

The court went on to state that it did not need to decide in this case,

what physical occupancy, of what kind, for what duration, constitutes a *Loretto* taking. It is enough to say that, on the facts before the Claims Court on the motion for summary judgment, we conclude that the occupancy by the Government was comfortably within the degree necessary to make out a taking.

Id. at 1377.

109. *Id.*

110. 444 U.S. 164 (1979).

111. 483 U.S. 825 (1987).

even though no particular individual is permitted to station himself permanently upon the premises.’”¹¹²

The Federal Circuit characterized the evidence in *Hendler* as reflecting a situation in which the government behaved as if it had acquired an easement “not unlike that claimed in *Kaiser Aetna*.”¹¹³ The court stated that pursuant to the easement,

the Government at its convenience drove equipment upon plaintiffs’ land for the purpose of installing and periodically servicing and obtaining information from the various wells it had located there. *Kaiser Aetna* and *Nollan* would seem to leave little doubt that such activity, even though temporally intermittent, is not ‘temporary.’ It is a taking of the plaintiffs’ right to exclude, for the duration of the period in which the wells are on the property and subject to the Government’s need to service them.¹¹⁴

The court of appeals concluded that the evidence supported the finding of a taking by physical occupation, and held that the Claims Court erred in not making such a finding.¹¹⁵

Professor Philip Weinberg of St. John’s University School of Law, in an article in the *Columbia Journal of Environmental Law* has called the Federal Circuit’s decision in *Hendler* “troubling and wrong-headed.”¹¹⁶ Professor Weinberg characterized the decision as “strange” and “mischievous,”¹¹⁷ suggesting that *Hendler* is contrary to the district court’s decision in *United States v. Charles George Trucking Co.*,¹¹⁸ a decision not cited by the *Hendler* court. However, in that case the district court, while rejecting the owners’ challenge to the EPA’s order to enter their property, nonetheless recognized that “[i]f the implementation of the remedy works an effective taking of the defendants’ property, the defendants may have a justiciable claim that they will be able to pursue in the Claims Court, pursuant to the Tucker Act, 28 U.S.C. § 1491.”¹¹⁹

112. *Hendler*, 952 F.2d at 1377 (quoting *Nollan*, 483 U.S. at 832).

113. *Id.* at 1378.

114. *Id.*

115. *Id.* The court stated:

The issue before the court in *Hendler I* was whether, on the facts before it, the Government took any property by permanent physical occupation, thus obliging it to pay plaintiffs just compensation. The trial judge thought not, absent more facts; we think nothing more needed to be shown. The trial judge denied plaintiffs’ motion for summary judgment on this point; he should have granted it.

Id.

116. Philip Weinberg, *Hendler v. United States: I’ll Let You Save Me—If You Pay Me for the Privilege*, 17 COLUM. J. ENVTL. L. 233 (1992).

117. *Id.* at 235, 244.

118. 682 F. Supp. 1260 (D. Mass. 1988).

119. *Id.* at 1271.

Professor Weinberg also disagreed with the court of appeals' interpretation of the word "permanent."¹²⁰ He stated that a physical occupation "of temporary duration may constitute a taking if it completely deprives the owner of the property for the duration of the appropriation."¹²¹ He stated that the World War II cases relied upon by the *Hendler* court all involved "total appropriations."¹²² By contrast, Professor Weinberg stated, "the Supreme Court has consistently made clear that partial takings, or inverse condemnations, which are occupations that do not completely deprive the owner of the property, are actionable only if permanent in duration,"¹²³ citing cases involving temporary or occasional flooding or overflows of water,¹²⁴ as opposed to permanent or recurring flooding.¹²⁵ The Federal Circuit, however, reasoned that once the physical occupation went beyond mere trespass the extent of the government's physical occupation of the property was relevant only to the amount of compensation and not to whether a taking had occurred.¹²⁶ Thus, the *Hendler* court held, the physical occupation of the plaintiffs' land in this case was sufficiently "permanent" to qualify as a taking for which compensation was due even though the occupation by the EPA and California was not "exclusive, or continuous and uninterrupted" and would continue only so long as was necessary to combat the groundwater pollution from the adjacent hazardous waste site.¹²⁷

The Federal Circuit further held, in reversing the holding of the Claims Court in *Hendler*, that California's activities in assisting the EPA in its Superfund efforts were attributable to the government for purposes of the property owners' takings claims.¹²⁸ The Federal Circuit characterized the activities of the EPA and California as "two . . . coordinated parts of the same undertaking,"¹²⁹ noting that the authority of California personnel to

120. Weinberg, *supra* note 116, at 236.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g., Sanguinetti v. United States*, 264 U.S. 146 (1924).

125. *See, e.g., United States v. Cress*, 243 U.S. 316 (1917).

126. *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991).

127. *Id.* at 1377. The court made reference to the confusion arising from the use of the term "temporary taking." *Id.* at 1376 (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)). The court noted that all takings are "temporary" in that "the government can always change its mind at a later time." *Id.*; *see also supra* notes 106-08 and accompanying text.

128. *Hendler*, 952 F.2d at 1379.

129. *Id.* at 1378.

enter upon plaintiffs' property derived from a federal statute¹³⁰ and the EPA order issued pursuant thereto.¹³¹

2. *The Janowsky and Meek Cases—Owner's Consent*

In *Janowsky v. United States*,¹³² the plaintiffs were the owners of a business called Geno's Vending in Gary, Indiana.¹³³ The plaintiffs agreed to permit the FBI to use their business as a front for an undercover investigation.¹³⁴ At the conclusion of the investigation, they brought suit in the Claims Court seeking damages for breach by the FBI of an alleged implied-in-fact contract to compensate them for their services and for the use of their business.¹³⁵ Alternatively, the plaintiffs sought just compensation for what they contended had been the inverse condemnation of their business by the FBI.¹³⁶ In an opinion by Judge Turner, the Claims Court held that it lacked jurisdiction over the contract claim and that the taking claim must be dismissed because, on the facts as pleaded, the plaintiffs had agreed to allow their property to be used by the government.¹³⁷ Accordingly, the court dismissed the plaintiffs' taking claim for failure to state a claim upon which relief can be granted.¹³⁸

The plaintiffs appealed to the United States Court of Appeals for the Federal Circuit which, in an unpublished opinion, reversed the Claims Court's dismissal of the contract claim for lack of jurisdiction and remanded for further consideration of that claim.¹³⁹ The court of appeals, in an opinion

130. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1988)).

131. *Hendler*, 952 F.2d at 1378-79. The Federal Circuit also held that the Claims Court abused its discretion in the second *Hendler* decision by dismissing the property owners' lawsuit for failing to comply adequately with the Government's discovery requests. *Id.* at 1383.

132. 23 Cl. Ct. 706 (1991).

133. *Id.* at 707.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 711. The court noted the distinction between the taking of private property for public use and the government's receipt of property pursuant to an agreement with the property owner, stating that:

when a citizen delivers property to the government pursuant to an agreement, an inverse condemnation claim does not arise simply because the government does not pay; the property owner's consent to the arrangement vitiates a claim that the government took the property for public use within the meaning of the Fifth Amendment.

Id. at 713.

138. *Id.* at 716.

139. *Janowsky v. United States*, No. 92-5004, 1993 U.S. App. LEXIS 3617 (Fed. Cir. Feb. 17, 1993).

authored by Circuit Judge Archer, also vacated Judge Turner's order dismissing the taking claim.¹⁴⁰

The court of appeals noted that "[t]he parties do not dispute that if a contract exists there can be no taking within the meaning of the Fifth Amendment."¹⁴¹ The court of appeals noted, however, that one of the plaintiffs contended that "if there was no implied-in-fact contract with the FBI, his cooperation with the FBI was not voluntary."¹⁴² The plaintiff contended that "in the absence of a contract, he was misled and, in effect, coerced into cooperating with the FBI and permitting his business to be used in the sting operation." The plaintiffs argued that their consent to participate in the undercover operation by allowing the FBI to run their business "was predicated on assurances of compensation."¹⁴³

The court of appeals held that "[i]n order to grant a motion to dismiss for failure to state a claim, a court must determine that there is no set of facts under which the plaintiff could recover."¹⁴⁴ "This cannot be said here,"¹⁴⁵ the court of appeals stated, adding: "The court on remand should reconsider whether Janowsky's property was involuntarily taken by the FBI if it determines that there was no implied-in-fact contract with the FBI."¹⁴⁶

In *Meek v. United States*,¹⁴⁷ the Claims Court addressed whether the Internal Revenue Service's acceptance of \$225,000 from the plaintiff in return for the IRS's interest in property at a sealed-bid tax sale, where the property was subject to a lien superior to the IRS's tax lien, constituted a compensable taking of the plaintiff's \$225,000 under the Fifth Amendment.¹⁴⁸ The property in question was encumbered by the IRS's tax lien and, unknown to the plaintiff, by a superior lien held by a building supply company.¹⁴⁹ Following the sale of the property by the IRS to plaintiff for \$225,000 but before the plaintiff received a deed to the property, a trust, which had acquired the building supply company's note on the property, foreclosed on its lien.¹⁵⁰ The IRS then reacquired the property from the trust and sold the property again in a second sealed-bid tax sale to a party not involved in the suit for \$285,000 without refunding plaintiff's \$225,000 payment.¹⁵¹

140. *Id.* at *10.

141. *Id.* at *9.

142. *Id.* at *10.

143. *Id.*

144. *Id.*; see *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

145. *Janowsky*, 1993 U.S. App. LEXIS at *10.

146. *Id.* at *10-11.

147. 26 Cl. Ct. 1357 (1992), *appeal docketed*, No. 93-5043 (Fed. Cir. Dec. 15, 1992).

148. *Id.* at 1366.

149. *Id.* at 1358.

150. *Id.* at 1360.

151. *Id.* at 1361.

In an opinion authored by Chief Judge Smith, the Claims Court directed the entry of judgment for defendant, holding that there was no compensable taking even though the property sold to the plaintiff was subject to a lien superior to the IRS's tax lien and that the IRS had received a windfall.¹⁵² The Claims Court reasoned that the plaintiff had voluntarily purchased the property at the first tax sale "as is" and "where is" and had voluntarily paid both the \$50,000 down payment and the \$175,000 balance following the sealed-bid sale.¹⁵³ The court noted that while the plaintiff's loss was unfortunate, it was the result of the foreclosure of a superior lien and not due to the IRS's use of governmental power.¹⁵⁴ In essence, according to Chief Judge Smith, the plaintiff's problem stemmed from the limited property right he voluntarily purchased and not from the government's interference with such a property right.¹⁵⁵

C. Forfeiture/Seizure Cases

In *Eversleigh v. United States*,¹⁵⁶ the Claims Court addressed whether the Postal Inspection Service's seizure of the plaintiffs' postal packages following the arrest of one of the plaintiffs on drug-related charges and the Inspection Service's subsequent declaration that the plaintiffs forfeited such property constituted a compensable taking under the Fifth Amendment.¹⁵⁷ The Inspection Service seized the plaintiffs' postal packages and initiated forfeiture proceedings against the plaintiffs, employing both mail and publication notice to alert the plaintiffs of their right to contest the proceedings.¹⁵⁸ When the plaintiffs failed to respond in a timely manner, the Service declared the seized property to be forfeited.¹⁵⁹ The plaintiffs then filed suit in the Claims Court asserting that the Service's denial of their request for additional time to file a claim for recovery of the property was an abuse of discretion and that the forfeiture constituted a compensable taking within the meaning of the Fifth Amendment.¹⁶⁰

In an opinion authored by Judge Wiese, the Claims Court dismissed the plaintiffs' complaint and held that the forfeiture proceeding employed by the Inspection Service was "not a property deprivation of the sort that can give rise to a compensable taking under the Fifth Amendment."¹⁶¹ Rather, the

152. *Id.* at 1366.

153. *Id.*

154. *Id.*

155. *Id.*

156. 24 Cl. Ct. 357 (1991).

157. *Id.* at 358-59.

158. *Id.*

159. *Id.* at 359.

160. *Id.*

161. *Id.*

Claims Court reiterated the rule, derived from *Noel v. United States*,¹⁶² that if the forfeiture of property used in criminal activity is carried out in a lawful manner, it constitutes a permissible exercise of governmental authority and does not require compensation.¹⁶³ The Supreme Court, in *Lucas v. South Carolina Coastal Council*,¹⁶⁴ seemed sensitive to these principles when it carved out from its categorical rule an exception for regulation of personal property.¹⁶⁵ On the other hand, if the forfeiture is carried out in a manner that denies the property owner the procedural protections afforded by the forfeiture statute, then the forfeiture is unlawful.¹⁶⁶ Such unlawful conduct, however, cannot be the foundation for a Fifth Amendment taking claim.¹⁶⁷ "A taking claim may only be based on the Government's rightful exercise of its property, contract or regulatory powers."¹⁶⁸ The court was required to dismiss the plaintiffs' taking claim since on the facts alleged, the Inspection Service acted within the scope of its authority in seizing the plaintiffs' property.¹⁶⁹

In *B & F Trawlers, Inc. v. United States*,¹⁷⁰ the Claims Court addressed whether the United States Coast Guard's destruction and sinking of a burning vessel, which the Coast Guard was towing to port following seizure for the presence of controlled substances, constituted a compensable taking under the Fifth Amendment.¹⁷¹ After determining that the plaintiffs' vessel contained contraband, the Coast Guard towed the vessel toward Guantanamo Bay, Cuba.¹⁷² However, while being towed, a fire of unknown origin broke out on the vessel and the Coast Guard used its .50 caliber machine guns to sink the vessel because it constituted a floating danger to navigation.¹⁷³ The plaintiffs initially filed suit against the government in the United States District Court for the Southern District of Texas, alleging that the Coast Guard failed to use due care in towing the vessel and that it deliberately sank the vessel.¹⁷⁴ Following reversal by the United States Court of

162. 16 Cl. Ct. 166 (1989).

163. *Eversleigh*, 24 Cl. Ct. at 359. The court added that "[n]or would it matter that the owner of the forfeited property was unaware of its illicit use. Having entrusted the use of the property to another, the owner bears the consequences of his actions." *Id.* (citing *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-90 (1974)).

164. 112 S. Ct. 2886 (1992).

165. *Id.* at 2899.

166. *Eversleigh*, 24 Cl. Ct. at 359.

167. *Id.*

168. *Id.* (citing *Golder v. United States*, 15 Cl. Ct. 513, 518 (1988)).

169. *Id.* at 360.

170. 27 Fed. Cl. 299 (1992).

171. *Id.* at 300.

172. *Id.* at 301.

173. *Id.*

174. *Id.*

Appeals for the Fifth Circuit of the district court's dismissal of the case,¹⁷⁵ the district court held that the Coast Guard's actions in boarding, towing, and destroying the vessel were shielded by the discretionary function exception to the Federal Tort Claims Act.¹⁷⁶ The district court also found that the vessel had little or no value at the time of its destruction and that it certainly would have had no value by the time the fire was extinguished.¹⁷⁷ The plaintiffs then filed suit in the Court of Federal Claims alleging that the Coast Guard's actions in deliberately sinking the vessel constituted a compensable taking under the Fifth Amendment.¹⁷⁸

In an opinion authored by Judge Robinson, the court granted the Government's motion to dismiss the plaintiffs' complaint.¹⁷⁹ The court first noted that the plaintiffs' allegation that the Coast Guard acted unlawfully in sinking the vessel sounded in tort, a claim over which the court had no jurisdiction.¹⁸⁰ To the extent, however, that plaintiffs alleged that the Coast Guard's conduct was lawful, plaintiffs had at least pleaded a claim within the Court of Federal Claims' subject matter jurisdiction.¹⁸¹ The court then analyzed the Coast Guard's conduct under the traditional *Penn Central*¹⁸² three-factor "test" which examines: (1) the character of the governmental action; (2) its economic impact upon the property owner; and (3) the degree of interference with the property owner's reasonable investment-backed expectations.¹⁸³ The court first noted that the Coast Guard had validly exercised the government's police power in sinking the burning vessel because it posed a danger to navigation.¹⁸⁴ Next, the court concluded that the economic impact of the Coast Guard's action was slight because the vessel was nearly worthless due to severe fire damage.¹⁸⁵ Finally, the court found that the plaintiffs, as owners of a United States registered sea vessel, reasonably should have expected that, where a vessel represents a danger to navigation,

175. *B & F Trawlers, Inc. v. United States*, 841 F.2d 626 (5th Cir. 1988).

176. *B & F Trawlers*, 27 Fed. Cl. at 301 (citing 28 U.S.C. § 2680(a) (1988)).

177. *Id.*

178. *Id.* at 300.

179. *Id.* at 306.

180. *Id.* at 303-04. The plaintiffs alleged that the Coast Guard violated 14 U.S.C. § 88(a)(4) (1988), which prohibits the destruction of a vessel unless it constitutes a danger to navigation, *id.*, and 21 U.S.C.A. § 881 (West Supp. 1992), which regulates the forfeiture procedures for vessels containing controlled substances. *B & F Trawlers*, 27 Fed. Cl. at 303-04. The court responded that "[t]o the extent plaintiffs assert that the Coast Guard unlawfully sank and destroyed the STAR TREK, plaintiffs have failed to allege a tenable claim for a compensable taking; that is, plaintiffs allege a claim sounding in tort, which is beyond the jurisdictional parameters of this court." *Id.* at 304.

181. *B & F Trawlers*, 27 Fed. Cl. at 304.

182. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

183. *Id.*

184. *B & F Trawlers*, 27 Fed. Cl. at 305.

185. *Id.* at 306.

the Coast Guard would have authority to destroy it in order to protect the public by removing the danger to navigation.¹⁸⁶ For these reasons, the Court found that the plaintiffs' complaint failed to state a claim for just compensation under the Fifth Amendment.¹⁸⁷

In *Perry v. United States*,¹⁸⁸ the Court of Federal Claims addressed whether the Federal Bureau of Investigation's (FBI) seizure and confiscation of the property of an individual, who was indicted for alleged violations of federal gambling laws on the basis of information obtained from improper wiretaps, constituted a taking under the Fifth Amendment.¹⁸⁹ In *Perry*, as a result of information obtained from a wiretap of the plaintiff, a district court judge issued a search warrant authorizing the FBI to search the plaintiff's safety deposit box.¹⁹⁰ The FBI seized cash and property of a value of \$70,675 contained in the plaintiff's safety deposit box on the ground that the property seized was used to violate federal gambling laws.¹⁹¹ Nearly fifty days after the FBI seized her property, the plaintiff filed a claim of ownership of the seized property and posted the requisite bond.¹⁹² However, the FBI determined during subsequent internal proceedings that the plaintiff had not provided sufficient information to establish that she was without knowledge or reason to believe that the property was used to violate federal gambling laws.¹⁹³ Accordingly, the FBI refused to return the property.¹⁹⁴ The United States Court of Appeals for the Eighth Circuit subsequently determined that the FBI had improperly obtained the underlying wiretap that served as the basis for the FBI's search of the safety deposit box and for the plaintiff's indictment.¹⁹⁵ The Government subsequently dismissed the indictment.¹⁹⁶ Thereafter, the plaintiff filed suit in the Claims Court seeking \$70,675, plus interest, attorneys' fees and costs based upon the FBI's taking of her property.¹⁹⁷

In an opinion authored by Judge Nettlesheim, the Claims Court, relying on *Eversleigh v. United States*,¹⁹⁸ dismissed the plaintiff's claim.¹⁹⁹ The court noted that forfeiture proceedings are "quasi-criminal" in nature and

186. *Id.*

187. *Id.*

188. 28 Fed. Cl. 82 (1993).

189. *Id.* at 84.

190. *Id.* at 83.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *United States v. Feiste*, 961 F.2d 1349 (8th Cir. 1992).

196. *Perry*, 28 Fed. Cl. at 84.

197. *Id.*

198. 24 Cl. Ct. 357 (1991).

199. *Perry*, 28 Fed. Cl. at 84-85.

undertaken in support of the criminal laws.²⁰⁰ The court stated that if the forfeiture of property used in criminal activity is carried out in a lawful manner, it constitutes a permissible exercise of governmental authority and does not require just compensation.²⁰¹ On the other hand, if the forfeiture is effected in a manner that deprives the property owner of procedural protections afforded by the authorizing statute, the forfeiture is unlawful and cannot be the predicate for a Fifth Amendment taking claim.²⁰² Rather, where the taking is unlawful, the plaintiff's remedy would be a suit for return of the seized property, equitable relief that the Claims Court was not empowered to grant.²⁰³

In *Alde, S.A. v. United States*,²⁰⁴ the Court of Federal Claims addressed whether the United States Customs Service entered into an implied-in-fact bailment contract when it seized the plaintiff's aircraft, which was destroyed by Hurricane Hugo while in the Custom Service's possession, and whether such seizure constituted a compensable taking.²⁰⁵ When the Customs Service seized the plaintiff's aircraft for failing to request landing rights, it informed the plaintiff that prior to releasing the aircraft, the plaintiff would have to pay an administrative penalty, seizure and storage costs, and execute a Hold Harmless Agreement.²⁰⁶ The Customs Service then seized the plaintiff's aircraft again for violating the export declaration laws and instituted forfeiture proceedings.²⁰⁷ The plaintiff posted a bond in connection with the forfeiture proceedings and sought the return of the aircraft.²⁰⁸ During the period that the aircraft was in the Custom Service's possession, Hurricane Hugo caused extensive damage to the aircraft.²⁰⁹ The plaintiff acquired the aircraft after paying the Customs Service the requested seizure and storage costs.²¹⁰ The plaintiff then filed suit in the Court of Federal Claims seeking payment for damages to the aircraft on the theory the Customs Service

200. *Id.* at 85.

201. *Id.*

202. *Id.*; see also *Florida Rock Indus. v. United States*, 791 F.2d 893, 898-99 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

203. *Eversleigh*, 24 Cl. Ct. at 85; see *supra* notes 162-75 and accompanying text.

204. 28 Fed. Cl. 26 (1993).

205. *Id.* at 27.

206. *Id.* at 28.

207. *Id.* Both statutes relied upon by the Customs Service for its seizure authority, 19 U.S.C. § 1436(a)(2) (1988) and 22 U.S.C. § 401(a) (1988), provided that property seized was subject to forfeiture. *Alde*, 28 Fed. Cl. at 28.

208. *Alde*, 28 Fed. Cl. at 28.

209. *Id.*

210. *Id.*

breached an implied-in-fact bailment contract.²¹¹ Alternatively, plaintiff sought just compensation for the taking of its aircraft by seizure.²¹²

In an opinion authored by Judge Nettlesheim, the Court of Federal Claims granted the Government's motion for summary judgment.²¹³ Initially, the court held that the plaintiff had failed to demonstrate the elements necessary to prove the existence of an implied-in-fact contract.²¹⁴ The court noted the plaintiff had failed to establish that the government intended to enter into a bailment arrangement for the seized property.²¹⁵ The court observed that ordinarily no reason would exist for law enforcement officers to offer a bailment agreement to a person whose property is being seized, adding that unilateral acts of government officials acting pursuant to their police powers "do not suggest a mutual intent to enter into a bailment contract."²¹⁶ The court found that there was no evidence of either an offer or an acceptance of a bailment arrangement by either party.²¹⁷ Indeed, the Customs Service specifically informed the plaintiff that prior to release of the aircraft, plaintiff would have to pay an administrative penalty, seizure and storage costs as well as execute a Hold Harmless Agreement.²¹⁸ Additionally, the Customs Service never represented that it intended to enter into a bailment arrangement.²¹⁹ Moreover, unlike a typical bailment situation, the Customs Service made continuing efforts to deprive the plaintiff permanently of its aircraft through forfeiture proceedings.²²⁰ As the court noted: "When property is

211. *Id.* at 29.

212. *Id.*

213. *Id.* at 34.

214. *Id.* at 30-33. The court noted that in order to establish the existence of an implied-in-fact contract over which the court has jurisdiction, the plaintiff must demonstrate the existence of the same elements as an express contract, i.e., mutual intent to contract including an offer, an acceptance, and adequate consideration. *Id.* at 30 (citing *Kollsman v. United States*, 25 Cl. Ct. 500, 514 (1992)). The court also noted that, in situations involving the government, the plaintiff must establish that the officer whose conduct is in question had the requisite actual authority to bind the government. *Id.*

215. *Id.* The court stated that "[t]he[] cases evince a uniform reluctance to find an implied bailment contract in cases similar to the one at hand where plaintiff's property has been seized pursuant to the Government's exercise of its police power." *Id.*; see also *Ysasi v. Rivkind*, 856 F.2d 1520, 1526 (Fed. Cir. 1988) (holding that there was no bailment contract formed when the Immigration and Naturalization Service seized a truck for suspected violation of immigration laws); *Marshall v. United States*, 21 Cl. Ct. 497, 499 (1990) (denying a request to hold the government as bailee for the United States Marshall Service's seizure of powder suspected of violating federal law); *Scope Enters., Ltd. v. United States*, 18 Cl. Ct. 875, 884 (1989) (stating that money seized by the Customs Service for the unlawful export of technology did not create a bailment agreement).

216. *Alde*, 28 Cl. Ct. at 31 (citing *Marshall v. United States*, 21 Cl. Ct. 497, 499 (1990)).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 32. The court added:

seized pursuant to the Government's police powers, it is particularly difficult to assume formation of a bailment contract."²²¹ The court also held that the plaintiff's allegations that the government acted unlawfully meant that the Customs Service's acts could not have given rise to a compensable taking.²²² Because a compensable taking could only occur when the government acted lawfully, the plaintiff's allegations that the property was taken unlawfully—which were required to be accepted as true in the context of defendant's motion for summary judgment—necessarily eliminated the foundation of plaintiff's taking claim.²²³

III. DEFINITION OF PROPERTY AND MEASURE OF JUST COMPENSATION

In *Board of County Supervisors v. United States*,²²⁴ the Claims Court addressed whether the government's legislative taking of land adjacent to the Manassas National Battlefield Park, which rendered valueless proffers accepted by Prince William County as a condition of rezoning the property for development, constituted a compensable Fifth Amendment taking of the County's property.²²⁵ As a condition of obtaining rezoning, the developer voluntarily made certain proffers to the County.²²⁶ The proffers included an agreement to provide recreational facilities, such as tennis courts and a swimming pool, and to make monetary contributions for public works projects, such as sewer and water facilities and major roadways.²²⁷ When Congress enacted the Manassas National Battlefield Park Amendments of 1988,²²⁸ which vested title to the developer's property in the United States, the County filed suit alleging that as a result of the government's legislative taking, it lost the benefit of the proffers, which, according to the County,

One whose property is seized subject to forfeiture cannot reasonably assert that the Government is "holding the property for a specific purpose" and that the property will be returned or safeguarded. The only reasonable understanding of "forfeiture" is that the property rights of the owner have been or will be extinguished.

Id.

221. *Id.* at 31.

222. *Id.* at 33. The court concluded broadly: "As in respect of cases dealing with the formation of an implied bailment contract based on the seizure of property by the Government, assertions that a taking occurred have been uniformly rejected. Seizures carried out by the Government under its police power are not takings." *Id.* at 34.

223. *Id.* at 33. The court noted that it did not have jurisdiction to entertain challenges to the propriety of the government's initial seizure of the aircraft. *Id.* at 33 n.7.

224. 23 Cl. Ct. 205 (1991), *dismissed*, 27 Fed. Cl. 339 (1992).

225. *Id.* at 207-08.

226. *Id.* at 207.

227. *Id.*

228. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 10001, 102 Stat. 3342, 3810 (codified at 16 U.S.C. § 429(b) (Supp. III 1991)).

constituted property under the Fifth Amendment and for the taking of which the County was entitled to just compensation.²²⁹

In a case of first impression, Judge Tidwell of the Claims Court granted the Government's motion for partial dismissal of the County's claim.²³⁰ The court ruled that the developer's proffers, in and of themselves, are not property interests.²³¹ Rather, proffers become binding development restrictions on the owner until subsequent rezoning or, as a matter of practicality, until development is stopped.²³² Once the legislative taking precluded the proposed development, the restrictions imposed upon the developer "simply ceased to exist as of the date of the taking; they were not taken."²³³

The Claims Court also rejected the County's contention that the proffers constituted a protected "dedication," i.e., "the setting aside of land, or of an interest therein, to the public use; or a form of transfer by an owner to the public of a fee or lesser interest in land."²³⁴ The court reasoned that, under Virginia law, proffers accepted by a county zoning board as a condition of rezoning were not dedications because the county maintained the ability to rezone the property unilaterally after it accepted the proffers.²³⁵

The Claims Court similarly rejected the County's assertion that the proffers constituted "restrictive covenants" that are compensable property interests under Virginia law if taken by eminent domain.²³⁶ The court posited that even though the proffers "touched and concerned" the land, there was no privity of estate between the County and the developer.²³⁷ Accordingly, the proffers were not restrictive covenants under Virginia law.²³⁸ The court

229. *Board of County Supervisors*, 23 Cl. Ct. at 207.

230. *Id.* at 214.

231. *Id.* at 209. The court explained that the proffers were the result of "[c]onditional zoning[, which] provides zoning authorities with added flexibility. In situations where rezoning otherwise would effect an unacceptably drastic change, conditional rezoning mitigates the impacts to an acceptable level by adding certain use limitations, or conditions, i.e., proffers." *Id.* at 208.

232. *Id.* at 209.

233. *Id.*

234. *Id.* at 210 (citing *City of Norfolk v. Meredith*, 132 S.E.2d 431, 434 (Va. 1963)).

235. *Id.*

236. *Id.* at 210-12. The court noted:

Had [the property owner] sold the property at issue, any new owner would have taken title subject to the proffers, and would have been permitted to develop the land only in accordance with the zoning. Proffers are noted in official zoning maps, can be recorded, and effect title. Therefore, the court does not believe that the proffers merely were collateral to the land, but that they did "touch and concern" the land.

Id. at 211.

237. *Id.* at 210.

238. *Id.*

also held that the proffers were not equitable servitudes under Virginia law.²³⁹

The County additionally sought compensation for approximately sixteen acres of land that the developers had deeded to it in fee simple for public streets.²⁴⁰ That claim was unaffected by the partial dismissal, and in a separate opinion after trial on that claim, Judge Tidwell held that because the County provided no evidence of loss as a result of the taking of the deeded land, it was not entitled to compensation for the legislative taking of that property.²⁴¹ As Judge Tidwell noted, courts generally “apply the ‘substitute facilities’ standard to determine just compensation for streets, sewers or other public facilities for which fair market value cannot be determined accurately.”²⁴² However, the County in this case stipulated that substitute facilities were not required.²⁴³ The court went on to observe that when no substitute facility is necessary and when the lands dedicated as streets cannot be used for any purpose that would bring the public entity profit, the taking results in no loss and the party may not recover any compensation, except for nominal damages.²⁴⁴

The court held that the County’s interest in the land in question was burdened for use as streets at the time of the taking and that the County had failed to establish that it could have abandoned the roads and sold the property as unburdened land.²⁴⁵ The court concluded that because the County had not met its burden of proof to establish any loss which resulted from the taking, it was not entitled to compensation.²⁴⁶

239. *Id.* at 211. The court found that

[p]laintiff did no more than discuss, in general terms, the reasons this court should find that an equitable servitude exists, *i.e.*, equitable servitudes and proffers both are promises. Plaintiff pointed to no authority, nor has the court been able to find any, to sustain the contention that a zoning ordinance may be considered an equitable servitude.

Id. at 212.

Thereafter, on December 12, 1991, the County sued the developers in Virginia state court seeking to recover the value of the proffers from them. Ultimately, however, the County voluntarily dismissed that action. *Board of County Supervisors v. Perch Assocs. Ltd. Partnership*, Chancery No. 32215, (Prince William County Cir. Ct. Mar. 11, 1993) (ordering dismissal without prejudice). [The authors’ firm was counsel for certain of the defendants in that action.]

240. *Board of County Supervisors v. United States*, 27 Fed. Cl. 339 (1992).

241. *Id.* at 348.

242. *Id.* at 342 (citing *United States v. 50 Acres of Land*, 706 F.2d 1356, 1359 (5th Cir. 1983), *rev’d on other grounds*, 469 U.S. 24 (1984)).

243. *Id.* at 341.

244. *Id.* at 343.

245. *Id.* at 345-46.

246. *Id.* at 347-48. The court stated:

Because the County’s rights of way were burdened both by use and transferability, it must have proved at trial that the use to which its rights of way were restricted,

IV. THE IMPACT OF *UNR* AND *KEENE*

Several areas of the Court of Federal Claims' procedural jurisprudence have significant practical effects on the litigation of takings cases against the federal government. One of the most important is the jurisdictional issue raised when a takings plaintiff sues the government in two forums—one the Court of Federal Claims, in which the plaintiff seeks just compensation, and the other a United States district court, in which the plaintiff may litigate other related issues concerning the takings claim. The impact of district court litigation on the jurisdiction of the Court of Federal Claims is governed by 28 U.S.C. § 1500, and interpretation of that statute has undergone significant evolution in the past year.²⁴⁷ In *UNR Industries, Inc. v. United States*,²⁴⁸ the United States Court of Appeals for the Federal Circuit held that when a complaint is filed in the Court of Federal Claims while the same claim is pending in another court, the Court of Federal Claims lacks jurisdiction.²⁴⁹ That rule is a trap for the unwary requiring careful litigation practice and, possibly, difficult tactical decisions.

public streets, was profitable or did not preclude other profitable uses. The County provided no evidence at trial that it could sell the street rights of way to a private party, or any other entity, for street purposes.

....

Neither parties' expert appraiser testified at trial as to the value of the County's rights of way as burdened for street purposes. While defendant's expert appraiser based his appraisal on the market value of the rights of way as unencumbered land, less percentages for certain other perceived restrictions on the rights of way, he did not provide a percentage reduction based upon the land's burden for street purposes. Rather, his estimate was based upon the value of the rights of way as burdened by encumbrances he perceived lands no longer burdened for street purposes would have, i.e., sewer and water easements. Because plaintiff could not provide the court with evidence that its rights of way as encumbered had value, to prevail it had to provide the court with evidence of other profitable uses of the land as burdened. . . . Plaintiff did not even attempt to do so at trial. As a result, plaintiff did not meet its [sic] burden of proof to establish any loss which resulted from the taking.

Id. (citations omitted).

247. The statute states:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C.A. § 1500 (West Supp. 1993). For a discussion of the statutory history and related case law, see David Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 GEO. L.J. 573 (1967).

248. 962 F.2d 1013 (Fed. Cir. 1992), *aff'd sub nom. Keene Corp. v. United States*, 113 S. Ct. 2035 (1993).

249. *Id.* at 1021. *UNR* involved suits filed in the Claims Court by manufacturers and suppliers of asbestos products seeking indemnification from the federal government for damages awarded in personal injury suits filed against them by shipyard workers exposed to asbes-

Section 1500 states that the Court of Federal Claims "shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States."²⁵⁰ Before *UNR*, the Court of Federal Claims routinely exercised jurisdiction over takings cases despite the fact that another suit was pending in another court.²⁵¹ Most recently, in *Oak Forest, Inc. v. United States*,²⁵² the court, through Judge Bruggink, had before it a takings claim brought by plaintiffs while a quiet title proceeding was pending in a federal district court in South Carolina.²⁵³ The court, faced with a motion to dismiss by the United States for lack of jurisdiction, held that it had jurisdiction over the takings claim, but that the action should be suspended pending resolution of the previously

tos. *Id.* at 1015. At the time the plaintiffs filed their actions in the Claims Court, there were suits based on the same facts pending before federal district courts. *Id.* The Claims Court held that 28 U.S.C. § 1500 precluded it from exercising jurisdiction where, at the time the Claims Court action was filed, the plaintiffs had pending similar claims before the district courts. *UNR Indus., Inc. v. United States*, 17 Cl. Ct. 146, 155 (1989).

On appeal, the Court of Appeals for the Federal Circuit undertook what it described as "a comprehensive effort to set out the proper interpretation of a jurisdictional statute, a matter that does not require a pointed dispute between parties." *UNR*, 962 F.2d at 1023. In that regard, the court stated: "In the course of this interpretive effort, if prior cases are seen as inconsistent, it is incumbent on the court to acknowledge their nonviability." *Id.* The court concluded that under § 1500:

1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply.

Id. at 1021.

250. 28 U.S.C.A. § 1500.

251. See, e.g., *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 375, 376 (1988), later proceeding, 21 Cl. Ct. 153, 154 (1990), appeal docketed, No. 91-5050 (Fed. Cir. Feb. 15, 1991). In *Loveladies*, at the time plaintiff commenced its takings case in the Claims Court, plaintiff had pending an action in the district court seeking judicial review of the denial of its permit application. The government did not assert that 28 U.S.C. § 1500 in any way affected the Claims Court's jurisdiction until after the en banc decision in *UNR*, by which time the case had been argued on the merits in the Court of Appeals for the Federal Circuit. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), appeal docketed, No. 91-5050 (Fed. Cir. Feb. 15, 1991) (United States' Motion Suggesting Lack of Jurisdiction in the Claims Court filed May 5, 1992).

252. 23 Cl. Ct. 90 (1991).

253. *Id.* at 92. The plaintiffs in the Claims Court action were not parties to the quiet title action, but a consent order had been entered in that proceeding pursuant to which the Government was to use its best efforts to effect the joinder in that proceeding of the Claims Court plaintiffs, among others, whose property interests might be affected by the outcome of the quiet title action. *Id.* at 93, 98.

filed district court case.²⁵⁴ In addition, in a line of cases stretching back twenty-five years, the predecessors of the Court of Federal Claims and United States Court of Appeals for the Federal Circuit, held that when the Court of Federal Claims case is filed first, that court's jurisdiction is not affected by the filing of a second lawsuit in district court.²⁵⁵

The Federal Circuit's decision in *UNR* changed these rules dramatically, as evidenced by post-*UNR* cases. For example, in *Cascade Development Co. v. United States*,²⁵⁶ the plaintiff filed a takings claim in the Claims Court, and then filed a petition for a writ of mandamus in federal district court.²⁵⁷ Relying on *UNR* before *Keene*, the Court of Federal Claims, through Judge Tidwell, ruled that it "lost jurisdiction over the matters pending before it, as a matter of law, when the district court case was filed."²⁵⁸ In *Donnelly v.*

254. *Id.* at 98. The Government contended that the appropriate remedy for the plaintiffs was to join the quiet title proceeding filed in the district court by other parties pursuant to the Quiet Title Act, 28 U.S.C. § 24092 (1988). *Oak Forest*, 23 Cl. Ct. at 93. Even though the Claims Court might have jurisdiction over the takings case, the Government argued that where title was disputed, the Quiet Title Act dictated the district court action as the exclusive remedy. *Id.* at 94. The Claims Court found that "the specific language in the Quiet Title Act disavow[s] any intent to affect such claims," *id.* at 95, and concluded that "the mere fact that title must be determined as part of this proceeding does not oust the court of jurisdiction." *Id.* at 96; *see also* *Gila Gin v. United States*, 231 Ct. Cl. 1001, 1002 (1982) (holding that "the jurisdiction of the district courts over quiet title actions under 28 U.S.C. § 2409a does not preclude us from determining actions for just compensation even though the existence of a taking *vel non* depends upon whether the government had title to the property it allegedly took").

Having found that plaintiff had viable claims under the Tucker Act, the court noted that "[t]he title aspects of this proceeding are largely duplicated in the district court proceedings." *Oak Forest*, 23 Cl. Ct. at 98. The court noted "the possibility of inconsistent results," *id.*, and observed that "Congress has clearly stated its instructions that the remedy of a declaration of present title as against the United States should be litigated in the district court." *Id.* The court concluded that "it would be a substantial waste of judicial resources and a burden on the defendant to litigate title . . . in two fora." *Id.*

255. *See* *Clark v. United States*, 8 Cl. Ct. 649, 652 (1985) (stating that the Government had conceded this interpretation of § 1500); *A.C. Seeman, Inc. v. United States*, 5 Cl. Ct. 386, 389 (1984); *ATL, Inc. v. United States*, 3 Cl. Ct. 49, 52 (1983); *Camero v. United States*, 345 F.2d 798, 800 (Ct. Cl. 1965); *Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966).

256. 27 Fed. Cl. 595 (1993), *appeal docketed*, No. 93-5087 (Fed. Cir. Feb. 22, 1993).

257. *Id.* at 597.

258. *Id.* Judge Tidwell relied on the Federal Circuit's ruling in *UNR* that "if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction." *Id.* (quoting *UNR*, 962 F.2d at 1021). That ruling was, in turn, based upon the court of appeals' purported overruling of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966). *UNR*, 962 F.2d at 1023. The purported overruling of *Tecon* was dicta, however, because none of the cases before the court of appeals in *UNR* involved the *Tecon* fact pattern, i.e., a case in which the plaintiff, at the time of filing in the Court of Federal Claims, does not have an action pending in any other court for or in respect to the same claim. *Keene*, 113 S. Ct. at 2041 n.4, 2044.

United States,²⁵⁹ another pre-*Keene* decision, the court was faced with an inverse condemnation claim filed by the plaintiff while a quiet title action was pending in a federal district court in Alaska.²⁶⁰ Following the precepts of *UNR* before *Keene*, the court, in an opinion by Judge Turner, determined “that the government’s motion to dismiss for lack of jurisdiction should be granted because the action pending in federal district court . . . when plaintiff filed the action in this court, divests this court of jurisdiction under 28 U.S.C. § 1500.”²⁶¹

When it reviewed the *UNR* decision a year later, the Supreme Court, in *Keene Corp. v. United States*,²⁶² appeared to take a more moderate approach. It held that § 1500 is governed by the principle that subject matter jurisdiction is determined as of the date an action is filed, and that if a district court action asserting the “same claim” within the meaning of § 1500 was pending at the time the plaintiff filed its complaint in the Court of Federal Claims, that court would lack jurisdiction over the case.²⁶³ The Court invoked the “longstanding principle that ‘the jurisdiction of the Court depends upon the state of things at the time of the action brought.’”²⁶⁴ That principle has always been understood to mean that “after vesting, [jurisdiction] cannot be ousted by subsequent events.”²⁶⁵ By adopting this “time of filing” principle, the Court cast serious doubt on dicta in the Federal Circuit’s *UNR* decision, which would have extended § 1500 to divest the Court

259. 28 Fed. Cl. 62 (1993).

260. *Id.* at 63.

261. *Id.* at 65.

262. *Keene Corp. v. United States*, 113 S. Ct. 2035, 2040-41 (1993).

263. *Id.* at 2040.

264. *Id.* (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)).

265. *Mollan*, 22 U.S. (9 Wheat.) at 539; see *Gwaltney, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69 (1987) (Scalia, J., concurring) (if subject matter jurisdiction “existed when the suit was brought, ‘subsequent events’ cannot ‘ous[t]’ the court of jurisdiction”) (quoting *Mollan*, 22 U.S. (9 Wheat.) at 539)); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938) (stating that the amount in controversy requirement is determined by allegations at the time of filing, and “[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction”); see also *Smith v. Sperling*, 354 U.S. 91, 93, n.1 (1957); *Wichita R.R. & Light Co. v. Public Util. Comm’n*, 260 U.S. 48, 54 (1922) (“Jurisdiction once acquired . . . is not divested by a subsequent change in the in the citizenship of the parties,” and “[m]uch less . . . by the intervention . . . of a party whose presence is not essential to a decision of the controversy between the original parties.”) (citation omitted); *Hardenbergh v. Ray*, 151 U.S. 112, 118 (1894) (when the original suit was brought, the court acquired jurisdiction of the controversy, and no subsequent change of the parties could effect that jurisdiction); *Clarke v. Mathewson*, 37 U.S. (12 Pet.) 164, 171 (1838); *Dunn v. Clarke*, 33 U.S. (8 Pet.) 1, 3 (1834) (stating that “no change in the residence or condition of the parties can take away a jurisdiction which has once attached”).

of Federal Claims of jurisdiction based on a *later*-filed district court action.²⁶⁶

Thus, although the *Keene* Court expressly declined to reach the issue of a later-filed district court action,²⁶⁷ its reasoning indicates that where no other action is pending at the time the suit is filed in the Court of Federal Claims, a subsequent action filed in another forum ought *not* to divest the Court of Federal Claims of jurisdiction.²⁶⁸ If that interpretation of *Keene* prevails, it would result in the following rules of practice: (1) If a suit is filed in the Court of Federal Claims at a time when the same claim seeking the same relief²⁶⁹ is pending elsewhere, jurisdiction will be lacking in the Court of Federal Claims; (2) If the same claim is not pending in any other action at the commencement of the Court of Federal Claims action, jurisdiction will be present throughout the proceeding even if a district court action is later filed.

These two rules create significant tactical issues for takings plaintiffs who must already guide their clients through somewhat muddled case law on the ripeness of takings claims before filing suit in the Court of Federal Claims. In just one example, if obtaining judicial review of the necessary "final agency action" requires a district court action against the federal agency responsible for the regulatory program at issue, that litigation may have to have run its course and be completely over before the Court of Federal

266. The Court commented, "In applying § 1500 to the facts of this case, we find it unnecessary to consider, much less repudiate, the 'judicially created exceptions' to § 1500 found in *Tecon Engineers*. . . ." *Keene*, 113 S. Ct. at 2044.

267. *Id.* at 2041 n.4.

268. In our capacity as counsel for the plaintiffs in *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991), we have taken this position in response to the Government's effort to use the *UNR/Keene* decisions to undo the judgment our clients won in 1989. Indeed, the Government's attempt to apply *UNR/Keene* in *Whitney* shows that it is prepared to exploit the new interpretation of § 1500 even to the point of seeking to apply it to a just compensation judgment entered in 1989 and fully appealed prior to the time the Federal Circuit issued *UNR*.

269. The Supreme Court in *Keene* expressly left open the question "whether two actions based on the same operative facts" would trigger a § 1500 bar where those actions involve "completely different relief." *Keene*, 113 S. Ct. at 2043 n.6 (citing *Boston Five Cents Sav. Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988); *Casman v. United States*, 135 Ct. Cl. 647 (1956)). *UNR* purported to overrule these two cases cited in *Keene*. *UNR*, 962 F.2d at 1022 n.3. The Federal Circuit recently expressed its intention to revisit en banc the viability of the *Casman* exception to § 1500 in a case which squarely presents the issue. See *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991) (order dated Sept. 28, 1993 specifying questions to be addressed in briefs incident to the court's en banc consideration of the jurisdiction of the Court of Federal Claims).

Claims will once again have jurisdiction to entertain the eventual takings claim.²⁷⁰

V. THE LEGAL AND PRACTICAL IMPACT OF GOVERNMENT ACTION

In *Flowers Mill Associates v. United States*,²⁷¹ the Federal Aviation Administration (FAA) had determined that a building which the plaintiff proposed to construct on land adjacent to an airport would constitute a hazard to air navigation.²⁷² The plaintiff asserted that the FAA's determination effected a compensable taking of his property.²⁷³ The Government moved to dismiss on the ground that the landowner failed to state a taking claim upon which relief could be granted.²⁷⁴ While recognizing the severe practical consequences of the FAA's determination, the Claims Court, in an opinion by Judge Turner, held that the Government's motion should be granted because the FAA's determination was only advisory and had no legally enforceable effect.²⁷⁵ Stating that the issue was apparently one of first impression in the Claims Court and the Federal Circuit, Judge Turner noted that unlike the

270. See *Loveladies Harbor, Inc. v. United States*, No. 91-5050 (Fed. Cir. Feb. 15, 1991) (order dated Sept. 1, 1993 ordering, sua sponte, rehearing en banc "on the question of the jurisdiction of the United States Court of Federal Claims").

Another obvious problem raised by the revision of rules in *UNR* and *Keene* relates to the operation of the six-year statute of limitations applicable in takings actions against the United States. Because of the change in interpretation of § 1500, numerous plaintiffs now face unexpected dismissal of takings actions on jurisdictional grounds due to the simultaneous pendency of district court litigation. Ordinarily, the jurisdictional problem could be cured by dismissing the district court action and then refile the takings claim. But some plaintiffs may face potential loss of claims if the limitations period has run during the period the takings claim has been in litigation. The problem remains even in litigation initiated after the *UNR* and *Keene* cases, because plaintiffs may find themselves unable to assert a takings claim in a timely way due to the need to litigate some related issue in the district court. Unless completion of that district court action is deemed a prerequisite to a ripe takings claim, the limitations period might run before the plaintiff is jurisdictionally able to file in the Court of Federal Claims.

In her separate opinion in *UNR*, Chief Judge Nies recognized this problem, and, pointing to the doctrine of equitable tolling, stated unequivocally: "Where a party has possibly two claims for relief and is barred from asserting them concurrently by section 1500, I do not believe the period allowed for bringing the additional or alternative claim should arbitrarily be cut off or even shortened. Section 1500 does not require such forfeiture." *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1026 (Fed. Cir. 1992) (Nies, C.J., stating additional views). Since then, the Court of Federal Claims has squarely resolved the problem, at least with respect to litigation filed prior to *UNR/Keene*, by holding that a timely filed claim in the Court of Federal Claims that is later dismissed pursuant to § 1500 tolls the running of the limitations period for purposes of refiling the claim after the jurisdictional defect under § 1500 has been cured. *George F. Miller Farms, Ltd. v. United States*, 27 Fed. Cl. 672,674 (1993).

271. 23 Cl. Ct. 182 (1991).

272. *Id.* at 184.

273. *Id.* at 183.

274. *Id.*

275. *Id.* at 188.

wetlands permit context, the FAA's determination that plaintiff's proposed construction in close proximity to an airport was a hazard to air navigation did not legally preclude the plaintiff from constructing the proposed building.²⁷⁶ Specifically, the court stated, "FAA's hazard finding was advisory only and not legally enforceable. A landowner is not required to obtain a permit from FAA before proceeding with development, and FAA has no power to prevent construction."²⁷⁷ Judge Turner noted that "[i]f Flowers Mill successfully obtained the necessary financing, insurance, and state permits, FAA would be powerless to prevent construction of the proposed building."²⁷⁸

Conceding that the FAA determination was technically only advisory and that no FAA-issued permit was required, the plaintiff argued that the practical effect of the hazard determination constituted a taking "since plaintiff was unable to obtain the necessary financing and insurance to commence construction."²⁷⁹ Concluding that "[t]here simply is no legal authority to support this position,"²⁸⁰ Judge Turner held that it was clear from the pleadings that, even assuming the FAA's determination had damaged the plaintiff by making it more difficult to develop the property as intended, the plaintiff would be unable to prove any set of facts entitling it to relief because the FAA "ha[d] not acted in any way to interfere with plaintiff's property rights."²⁸¹ Accordingly, the court granted the Government's motion to dismiss.

In *Shelden v. United States*,²⁸² the Claims Court addressed whether the Government's action in filing a *lis pendens* on certain property as a consequence of the conviction of the mortgagors under RICO and an order of forfeiture entered thereafter resulted in a compensable taking because it prevented the plaintiffs, innocent mortgagees, from foreclosing on the property when the mortgagors defaulted on their loan.²⁸³ The Claims Court initially held that the government's action in filing a *lis pendens* on the property did effect a compensable taking.²⁸⁴ The premise of the court's opinion was its conclusion from the record that plaintiffs would have been able to foreclose

276. *Id.*

277. *Id.* at 188-89. The court added that "[e]ven assuming that the economic impact of the eviction regulations on Flowers Mill would be great and that it would interfere with their distinct, investment-backed expectations, the FAA action cannot be the basis of a Fifth Amendment taking because of the voluntary nature of the regulatory scheme." *Id.*

278. *Id.* at 190.

279. *Id.* at 189.

280. *Id.*

281. *Id.* at 189-90.

282. 19 Cl. Ct. 247 (1990), *vacated*, 26 Cl. Ct. 375 (1992).

283. *Id.* at 248-50.

284. *Id.* at 252.

but for the filing of the notice of *lis pendens*.²⁸⁵ Eight months later, the Government moved for reconsideration under United States Claims Court Rule 60(b)(2) based upon newly discovered evidence that undermined the premise for the court's earlier opinion.²⁸⁶ Upon reconsideration, in an opinion authored by Chief Judge Smith, the Claims Court dismissed the plaintiffs' claim.²⁸⁷ The court noted that in order for there to be a taking, the plaintiffs were required to prove that they had a right to foreclose on the property and that the government prevented them from exercising that right.²⁸⁸ The court held that the government's action in filing a *lis pendens* did *not* result in a taking because the plaintiffs never perfected their right to foreclose.²⁸⁹ The Claims Court found that the mortgagors' conduct, not the government's *lis pendens*, precluded plaintiffs from foreclosing.²⁹⁰ Therefore, the court held that there was no taking by the United States.²⁹¹ That decision was reversed by the Federal Circuit in an opinion issued just before this article went to press.²⁹²

VI. CONCLUSION

In these many areas of takings law, from regulatory takings to forfeiture, the Court of Federal Claims has continued in the last two years to distin-

285. *Id.* at 252-53. The court rebutted the Government's argument that it never exerted control over the plaintiff's property:

Such a contention runs counter to the uncontroverted facts recounted above, and cannot be taken seriously. [The government]'s argument asks the court to believe that while the United States asserted a lien on real property, and prevented innocent mortgagees from foreclosing on the property, it did not in any way control that property. The government's position is, as the late Chief Judge Marvin Jones once said, "[s]ingularly free from any suspicion of logic."

Id. at 252 (quoting *Belcher v. United States*, 94 Ct. Cl. 137, 140 (1941) (footnote omitted)).

286. *Shelden v. United States*, 26 Cl. Ct. 375, 378 (1992) *rev'd*, No. 92-5154 (Fed. Cir. Oct. 15, 1993).

287. *Id.* at 381-82.

288. *Id.* at 379.

289. *Id.* at 380.

290. *Id.* The court observed:

Under state law, plaintiffs had the right to foreclose only if the Washingtons [the party to whom the property was sold] failed to cure. Even if the government's filing of the *lis pendens* could have prevented plaintiffs from foreclosing on their property. The fact that the Washingtons were able to cure their defaults prior to the foreclosure sale leads to the conclusion that the plaintiffs never had the right to foreclose [P]laintiffs have not shown any evidence in the record which illustrates any damage to their property interest caused by the *lis pendens*. Plaintiffs have not suffered a taking compensable under the Fifth Amendment.

Id.

291. *Id.*

292. *Shelden v. United States*, No. 92-5154 (Fed. Cir. Oct. 15, 1993) (order of forfeiture following RICO conviction effected transfer of mortgagor's interest to United States and rendered *Shelden's* mortgage lien unenforceable due to government's sovereign immunity).

guish itself as a major force in the development of the law. In some respects, the court has been a difficult forum for takings plaintiffs who have sought to push the law of regulatory takings further than the court has been willing to go. Nonetheless, the court has been willing to find a taking when government action has too drastically interfered with settled expectations. In addition, the Court of Appeals for the Federal Circuit has signaled a willingness to find a taking by physical occupation on facts that might previously have been regarded as rising merely to the level of trespass.